1988

Alfred T. Smurthwaite v. John Painter : Brief in Opposition to Certiorari

Utah Supreme Court

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880073-A

IN THE SUPREME COURT OF THE STATE OF UTAH

ALFRED T. SMURTHWAITE, (Plaintiff)Appellant-Petitioner, vs. JOHN PAINTER, (Defendant)Respondent.	**BRIEF OF RESPONDENT** (Court of Appeals Case No. 880073-A)

BRIEF IN OPPOSITION TO APPELLANT-PETITIONER'S PETITION FOR AN ISSUANCE OF A WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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(1) The caption of the case in this Court contains the names of all the parties.

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(4) QUESTIONS PRESENTED FOR REVIEW

A. DEFENDANT-RESPONDENT (PAINTER) DISAGREES WITH THE STATEMENT OF PLAINTIFF-APPELLANT'S (SMURTHWAITE) QUESTIONS PRESENTED FOR REVIEW IN THE FOLLOWING RESPECTS AND SUBMITS THAT THE FOLLOWING ARE THE QUESTIONS PRESENTED:

a. The Court of Appeals did not find an express agreement by Painter to exercise care for Smurthwaite's horses, in fact found just the opposite. The question presented is whether a bailment was established.

b. The public policy of the State concerning well being of animals is reflected in a criminal statute and was not part of the evidence presented at trial. The question presented is should this criminal statute form the basis for civil liability.

B. SMURTHWAITE'S PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI DOES NOT COMPLY WITH THE REQUIREMENTS OF RULE 43 OF THE RULES OF THE UTAH SUPREME COURT.

(5) REFERENCE TO REPORT OF COURT OF APPEALS OPINION

The Court of Appeals' opinion in this case appears at ____ P.2d ____, 84 Utah Adv. Rep. 49 (Utah App. 1988); the Court of Appeals Docket Number is 880073-CA. The unofficial report is attached as an addendum to Petitioner's brief at page ii.

(6) JURISDICTIONAL GROUNDS

(a) The decision sought to be reviewed was entered June 10, 1988.

(b) No rehearing was sought below, and no extension of time has been sought within which to petition for certiorari.

(c) This is an origional petition and not a cross-petition.

(d) The statutory provisions believed to confer on this Court jurisdiction to review the decision in question by a Writ of Certiorari are Utah Code Ann. Sections 78-2-2(3)(a) and 78-2-2(5).

(7) STATUTORY PROVISIONS

There are no statutory provisions directly on point covering this case.

(8) STATEMENT OF THE CASE

Painter agrees generally with Smurthwaite's statement of the case as far as it goes, with the following exceptions and additions: Paragraph 7 of Smurthwaite's statement of facts is erroneous in that Smurthwaite knew there were other animals, including at least 120 head of sheep and a horse trailer on the upper pasture (Trial Court Findings of Fact, Paragraphs 18 and 19, attached as Addendum to Smurthwaite's petition).

ADDITIONAL FACTS WHICH PAINTER DEEMS IMPORTANT TO A DETERMINATION OF THIS ISSUE

1. The agreement between the parties was one for pasturage rental only. Defendant had no responsibility to feed or care for Plaintiff's animals nor to inspect them or even repair the fences. (Trial Court Conclusions of Law, first paragraph attached as Addendum to Smurthwaite's petition).

2. The lower pasture, where Smurthwaite's horses died, is not observable from the barn area or the home of Painter. (Trial Court Findings of Fact, Paragraph no. 7, attached as Addendum to Smurthwaite's petition).

3. Under the agreement between the parties, Painter had no responsibility to feed or check the horses or even maintain fences. (Trial Court Finding of Fact no. 9, attached to petitioner's petition).

4. Smurthwaite had free access to the property to come and go as wanted and to move the horses in and out as he saw fit with no contact or interference from Painter. (Trial Court Findings of Fact no. 10, attached as Addendum to Smurthwaite's petition).

5. Painter at no time ever made any objection that his horses had been moved to the lower pasture. (Trial Court Finding of Fact nos. 15 and 27, attached as Addendum to Smurthwaite's petition).

6. There were three means of access to the lower pasture, one through Defendant's farm, one through the sewer plant property and one on the south end of the 350 acre parcel by Miller Pond. The sewer plant access was paved and kept plowed in the winter and Smurthwaite had used the sewer plant access at least six times prior to the 1983-84 winter to move the horses in and out. (Trial Court Findings of Fact nos. 29, 30, attached as Addendum to Smurthwaite's petition).

7. Smurthwaite inspected his horses every day in the fall and winter of 1981-82 and then three to four times each week. (Trial Court Findings of Fact no. 19, attached as Addendum to Smurthwaite's petition).

8. Smurthwaite inspected the horses on December 5, 1983 in the lower pasture and never inspected the horses again until February 4, 1984 and then only from the road where he could not identify his horses as they were too far away. (Trial Court Findings of Fact no. 25, attached as Addendum to Smurthwaite's petition).

9. Smurthwaite finally on February 7, 1984 walked down to the lower pasture to inspect his horses and found several dead. (Trial Court Findings of Fact no. 26, attached as Addendum to Smurthwaite's petition).

10. Painter was working full-time at his regular job in the winter of 1983-84 as he had at all times previous and during that winter never went into the fields and never saw any of Plaintiff's horses. (Trial Court Finding of Fact no.

32, attached as Addendum to Smurthwaite's peitition).

11. The agreement between the parties was not an agistment [bailment] agreement which requires in all cases that the person sought to be charged has some contractural responsibility for the care of the livestock. (Trial Court Conclusions of Law, paragraph 3 attached as Addendum to Smurthwaite's petition).

12. The Trial Court further concluded that the Defendant had no duty to care for the livestock or inspect the animals nor even to report their condition under the circumstances of this case. (Trial Court Conclusions of Law, paragraph 5 attached as Addendum to Smurthwaite's petition).

13. The court further concluded, however, that assuming such duty existed and the Defendant was found to be negligent in carrying off that duty the Court would conclude that the Plaintiff in failing to inspect his stock from December 5, 1983 to February 7, 1984 was negligent himself and that said negligence was at least equal to if not greater than that of Defendant. (Trial Court Conclusions of Law, paragraph 6 attached as Addendum to Smurthwaite's petition).

(9) ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT

Smurthwaite argues that the Trial Court and the Appeals Court both erred in ruling that no bailment is created where the contract between the parties is merely for pasturage and the parties expressly agree that the owner of the land owes no duty of care, maintenance, inspection, feeding or report-

ing upon the animals' condition.

Smurthwaite cites the case of Hughes vs. Yardley, 428 P. 2d, 158 (Utah 1969), and implies that said case was not before the Trial Court nor the Appeals Court in making their decision. Such is clearly erroneous because Painter cited that case and briefed it in his Respondent's Brief and the case of Yardley clearly is not a situation of a "pasturage-only" agreement. This has been clearly misstated by Smurthwaite in his petition. The case of Yardley consisted of an agreement between the parties that the Defendants would pasture cattle owned by the Plaintiff at Defendant's ranch for a specific period which was to commense on or about May 1, 1964 and terminate on or about October 1, 1964. The Plaintiff was to pay the Defendants for the pasturage, and for one-half of the market value of the gain of the cattle during that period. The agreement also contemplated that the Defendant have adequate fencing to prevent escape and at the end of the period the Plaintiff would remove the cattle wherein they would be weighed to determine the weight gain for the purpose of compensating the Defendant. This arrangement clearly differs from the agreement in the case at hand in that a bailment was indeed created pursuant to the requirements as clearly stated by the Appeals Court on page 3 of the unofficial copy of this decision which is attached to Smurthwaite's Addendum where the court states as follows: (quoting Baker vs. Hansen 666 P. 2d 315 (Utah 1983)).

> It is well established that a contract to care for animals for a specified term, an agistment, is a "species of bailment" and that under such a contract "there is ordinarily an obligation to return or account for the animals at the end of the term". Page 3 unofficial copy of Appeals Court case.

Smurthwaite also cites the Utah Agistor's Lien, Section 38-2-1 as support for his argument that an agistment bailment may be created under the circumstances of this case. First, it should be pointed out, that the agistor's lien is a lien to protect the agistor who has provided the care of the animals and allows the lien to be placed in effect similar to the mechanic's lien to insure that the agistor is paid prior to redelivery of the animals to the owner. This is an entirely different situation than the one at hand in that we are not discussing the right of Mr. Painter to receive payment but whether a bailment situation existed under the circumstances of this case. Secondly, it should also be noted that the agistor's lien specifically requires the creation of a bailment agreement before the lien may come into effect. The lien statute states in part as follows:

> Every ranchman, farmer ... to whom any domestic animals <u>shall be entrusted for the purpose of feeding, herding or pasturing shall have a lien upon such animals for the amount that may be due him for such feeding, herding or pasturing</u> and is authorized to retain possession of such animals until such amount is paid. Section 38-2-2, Utah Code Ann.

Therefore, the agistor's lien clearly also requires the creation of a bailment situation and for this reason and the fact that it is a statute to protect the bailee, not the bailor, is inapplicable in this case. The other cases cited

by Smurthwaite have been briefed and discussed and will not be discussed in this response to Smurthwaite's petition.

Smurthwaite also cites the criminal statute Section 76-9-301, Utah Code Annotated, (the animal cruelty statute) as somehow applying to this case. This statute is a criminal statute and does not create civil liability nor is it a part of our common law in the sense that it creates a new type of bailment agreement which Smurthwaite would have this court believe. The lower court addressed this on page 4 of the unofficial decision attached as an Addendum to Smurthwaite's petition wherein it stated that it declined to take the position urged that any agreement for the use of pasture carries with it a duty of care on the part of the landowner. The court stated as follows:

> "To do so would create a new species of bailment that was never intended or comtemplated by the parties. For an agistment bailment to be established there must be a showing of some duty of care, bargained for, and accepted by the landowner. There is no such showing in this case." Page 4 unofficial copy of Appeals Court case.

Finally, Painter submits that Smurthwaite has failed to meet the requirements of Rule 43 of the Rules of the Utah Supreme Court for considerations governing review of Certiorari. The Rule sets forth four considerations, none of which has been met, in that, 1) there is no showing that a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law; 2) there is no showing that

a panel of the Court of Appeals has decided a question of State or Federal law in a way that is in conflict with the decision of this court; 3) there is no showing that a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial procedings or has so far sanctioned such a departure by the lower court as to call for an exercise of this court's power of supervision; 4) and there is no showing that the Court of Appeals has decided an important question of municipal, state or federal law which has not been, but should be settled by this court.

RESPECTFULLY SUBMITTED this 22 day of July, 1988.

TAYLOR D. CARR
Attorney for Respondent

CERTIFICATE OF SERVICE

I do hereby certify that on the 26 day of July, 1988, I caused four copies of the foregoing Petition in Opposition to Issuance of a Writ of Certiorari to be delivered to the office of:

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